



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 10, 1998

Mr. J. Robert Giddings
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2981

OR98-1638

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 116416.

The University of Texas at Austin (the "university") received a request for all information relating to the release of a university athlete's academic status to a named radio station. The request also seeks all information relating to the resignation of the former head basketball coach, Mr. Tom Penders. You indicate that most of the investigation documents concerning the student records will be provided to the requestor. You explain, however, that the university is withholding personally identifiable information regarding specific students' academic information and educational records. 20 U.S.C. § 1232g (federal Family Educational Rights and Privacy Act of 1974 ("FERPA")); Gov't Code § 552.114; *see* Open Records Decision No. 634 (1995) ("An educational institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a 'student record,' insofar as the 'student record' is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.")

You also state that you released a copy of Mr. Penders' employment contract, the executed settlement and release agreement, and a file containing the documentation of a meeting held between university officials and a member of the Board of Regents. You claim, however, that the remaining responsive information, correspondence between counsel and drafts of the settlement agreement, are excepted from required public disclosure under the attorney-client and work-product privileges under sections 552.101, 552.107, and 552.111 of the Government Code. You additionally claim that one responsive document contains personal financial information protected from disclosure by section 552.102 of the

Government Code. We have considered the exceptions you claim and have reviewed the documents you have submitted.

We will first examine your contention that certain financial information must be withheld. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The test to be applied to information claimed to be protected under section 552.102 is the same as the test for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Open Records Act. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Common-law privacy protects from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public under common-law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

Previous decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Thus, a public employee's allocation of his salary to a voluntary investment program offered by their employer is a personal investment decision, and information about it is excepted from disclosure by a common-law right of privacy. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1992) (deferred compensation plan). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Open Records Decision No. 600 (1992). After examining the submitted information, we find that some of the information involves a financial transaction between an individual and the governmental body and some does not. Consequently, we have marked that information that must be withheld under section 552.102 based on the common-law right of privacy.

You next assert that the submitted information may be withheld because of the attorney-client privilege. Section 552.107(1) of the Government Code states that information is excepted from required public disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 (1990) at 5, 462 (1987) at 13-14.

The general rule of the attorney-client privilege provides that a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between various communicants. Tex. R. Civ. Evid. 503(b)(1). Subsection (a)(5) of this rule reads as follows:

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

The documents at issue here were created by, sent to, or intended for persons outside the university's attorney-client relationship. We do not believe that these documents are confidential communications subject to the attorney-client privilege under section 552.107(1). Accordingly, the university may not withhold the requested material from disclosure based on section 552.107(1).

You finally contend that the correspondence and drafts are excepted from disclosure by section 552.111 under the work-product privilege. This office has determined that to withhold attorney work-product under section 552.111, a governmental body must show that the work product (1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and (2) consists of or tends to reveal the thought processes of an attorney. Open Records Decision No. 647 (1996) at 5. The university has made neither of these demonstrations. Accordingly, the university may not withhold the requested information from disclosure based on section 552.111.

In your concluding paragraph, the university also raises section 552.116 of the Government as an exception to disclosure. You have not explained nor are we able to determine how or why this exception is applicable in this instance. Gov't Code § 552.116

(audit working papers). Consequently, you may not withhold the information under section 552.116. Gov't Code § 552.301. Except for the marked portions of one page, the submitted documents must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/nc

Ref: ID# 116416

Enclosures: Submitted documents

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